



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Litton Systems, Inc.

File: B-234060

Date: May 12, 1989

DIGEST

Protest is sustained where record shows that awardee improperly obtained source selection sensitive information concerning its competitor's product.

DECISION

Litton Systems, Inc., protests the award of a contract to Loral Systems Manufacturing Company under request for proposals (RFP) No. F33657-88-R-0096, issued by the United States Air Force. The contract is for the production of a total of 673 (basic quantity of 19 plus three option quantities totaling 654) advanced radar warning receivers (ARWR) for the RF-4C and F-16 aircraft. The ARWR is designed to detect enemy radar scanning of the aircraft and to warn the pilot of the significance of the radar scan. Litton contends that information made public to date in connection with Operation Ill Wind, a criminal investigation of alleged improprieties related to a number of Department of Defense procurements, indicates that, at a critical period in the competition, source selection sensitive information concerning Litton's product was improperly disclosed by the Air Force to Loral.

We sustain the protest on the basis that Loral improperly obtained source selection sensitive information concerning Litton's system, as explained below.^{1/}

In 1981, the Air Force awarded a contract to Litton on a sole-source basis for initial development of the ALR-74 radar warning receiver. The ALR-74 was conceived as a state of the art follow-on to the ALR-69 which was already being supplied to the Air Force by Litton for the F-16 "Falcon" fighter aircraft. In 1984, Litton was awarded an initial

^{1/} In its protest and supplement thereto, Litton raises several additional grounds for protest against the award to Loral which we find to be without merit.

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production contract for the ALR-74, also on a sole-source basis. Both contracts required Litton to develop a second source for the ALR-74. Litton selected Loral as the potential second source for the ARWR. Due to deficiencies identified during testing, the Air Force concluded that a continued sole-source acquisition was inappropriate. It therefore restructured the procurement in 1984 to permit a competition for development and procurement of the ARWR between Litton and Loral. The agency issued a justification and approval, on the basis of unusual and compelling urgency, authorizing a limited competition between the two firms. Loral was awarded a contract to produce an acceptable design to compete for the ARWR program. Loral at this time was already manufacturing the ALR-56C radar warning system for the F-15 "Eagle" fighter aircraft.

On September 16, 1988, the Air Force solicited proposals for full production of the ARWR from Loral and Litton. The competition was between Loral's ALR-56M, a repackaged version of its existing system, and Litton's updated ALR-74. The RFP provided for award on the basis of an integrated assessment of each responsible offeror's ability to satisfy the RFP requirements. The evaluation criteria, listed in descending order of importance, were technical, unit/life cycle cost, logistics/supportability, and management/manufacturing. The RFP permitted award of the contract on the basis of initial proposals.

Both Loral and Litton submitted proposals on October 31, 1988. Both offerors were determined to be technically acceptable. Loral's evaluated cost was significantly lower than Litton's evaluated cost. The Air Force determined that an award without discussions to Loral, the low offeror, would achieve the lowest overall cost to the government. Award was made to Loral on December 20.

On December 27, the United States District Court for the District of Maryland unsealed an affidavit that had been filed in support of requests for search warrants in connection with the Ill Wind investigation. The affidavit describes improper conduct involving the ARWR competition. After learning of the contents of this affidavit, Litton filed this protest on January 5, 1989. The affidavit, prepared by a special agent of the Federal Bureau of Investigation based on information obtained through wiretaps and other means, reports that the Deputy Assistant Secretary of Acquisition for Tactical Systems provided sensitive procurement information to a private consultant who in turn passed the information to a senior vice-president of Loral in return for money. With respect to the ARWR competition, the affidavit states that the consultant informed Loral of

the results of the Air Force official's visit to Litton in October 1987 to evaluate Litton's ARWR development. The consultant gave Loral an opportunity to review and copy portions of a "book"^{2/} describing Litton's methodology which was prepared for a briefing Litton gave the Air Force concerning its ARWR progress. The affidavit also states that the consultant in December 1987 obtained a paper relating to a classified briefing, which the Air Force official attended, that discussed Litton's dynamic electro-magnetic environment simulator (DEES) testing of its ARWR. The affidavit further states that the consultant "has continued to provide . . . [Loral] with information about the competition that he obtains from . . . [the Air Force official]." These disclosures of information began ten months before the production RFP was issued.

Litton asserts that the affidavit indicates that Loral was provided data procurement sensitive to Litton and that the timing of the release of the data was such that it would have permitted Loral to (1) more effectively design its own system, and (2) predict and prepare a cost model of the Litton system. Litton contends that the disclosure of its procurement sensitive data was detrimental to Litton's competitive position and gave Loral an unfair competitive advantage. Under these circumstances, Litton argues that the award to Loral should be terminated.

The Air Force does not dispute the statements contained in the affidavit. Rather, the Air Force argues that remedial action is not required here because Litton has failed to establish that any of the information contained in the "book" is proprietary, or that an Air Force official disclosed it to Loral.^{3/} We do not agree.

Whether or not the Air Force is correct that the information disclosed is not proprietary, every page of the "book" was marked by Litton "F-16 RWR Competition Source Selection Sensitive" at the direction of the F-16 program manager.

^{2/} The Air Force official's visit included a briefing for which viewgraphs were made by Litton describing its entire ALR-74 program through the date in early October 1987 when it was prepared. These viewgraphs comprise the "book" that was provided to Loral.

^{3/} In this regard, the Air Force contends that since the consultant purported to represent both Litton and Loral, the consultant may have provided the information to Loral without the assistance of the Air Force official.

The "book" contained 75 pages of detailed explanation of the Litton's system architecture and design features. It is clear that Loral was not entitled to access to this information.

Although the affidavit does not indicate how the consultant obtained a copy of the "book," it nonetheless indicates that after the Air Force official's visit to Litton's facilities, the consultant continued to provide Loral with information about the competition that he obtained from the Air Force official. While the affidavit does not state that the Air Force official gave the consultant the "book," given the close and continual relationship and joint actions between the consultant and the high ranking Air Force official as described in the affidavit, the clear implication in the affidavit is that the "book" was provided by the Air Force official.

In addition, the affidavit reveals that the consultant received a paper prepared for a classified briefing on the DEES testing which the Air Force official attended. It is clear from the record that only government officials had access to this paper. However, the consultant knew of the briefing from the Air Force official and told Loral that he would obtain the papers concerning the testing from the government official. While the affidavit does not indicate whether Loral received a copy of the DEES testing paper, the affidavit states that the consultant received a copy of this classified information and continued to provide Loral with information about the competition that he obtained from the Air Force official.

In any event, whether or not the Air Force official was involved in the actual release, the record establishes that procurement sensitive documents in the Air Force's possession concerning Litton's product were obtained by Loral.

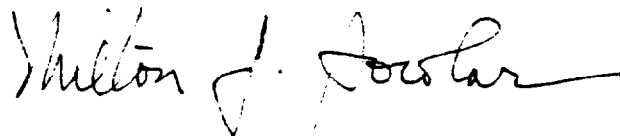
The Air Force primarily argues that, even if the allegations concerning the potential wrongdoings are true, it is difficult to conclude that Loral was able to take advantage of any improperly acquired information in any manner which affected the government's selection of an ARWR contractor. The Air Force states that it does not appear that Loral changed its fundamental technical approach (particularly in the 10-month time period prior to issuance of the production RFP) in a manner which would suggest that it adopted any Litton technical approach or that Loral was able to "cost model" Litton's approach in any effective manner. The Air Force further argues that there is no evidence of wrongdoing or improper influence concerning the source selection decision.

In this regard, the Air Force cites our holdings in Aydin Corp., B-232003, Nov. 25, 1988, 88-2 CPD ¶ 517 and Comptek Research, Inc., B-232017, Nov. 25, 1988, 88-2 CPD ¶ 518, involving the Ill Wind investigation, for the proposition that an improper disclosure of source sensitive information does not require resolicitation in the absence of a showing of prejudice. In these two cases, there was no evidence that the awardees improperly received any source selection sensitive information. Further, the protesters essentially were found outside the competitive range and had no reasonable opportunity of receiving the award. Here, however, the awardee improperly obtained the source selection sensitive information concerning its only competitor which submitted a technically acceptable offer. It may well be, as the Air Force argues, that this information did not give Loral an advantage in the competition. Nevertheless, we do not believe that the propriety of an award decision should turn solely on whether or not the improperly obtained information ultimately proved to be of benefit to the wrongdoer. The propriety of the award must also be judged by whether the integrity of the competitive process is served by allowing the award to remain undisturbed, despite the awardee's misconduct. Judged by this standard, we believe that the integrity of the system would be best served by a termination of the contract.

We therefore recommend that the Air Force terminate Loral's contract. The Air Force should then determine how it can best meet its needs for these systems in a manner which will ensure the integrity of the competitive process.

The protest is sustained.

By separate letter to the Secretary, we are recommending that the Air Force terminate for convenience the contract. We also find that Litton is entitled to be reimbursed its protest costs, including reasonable attorneys' fees.
4 C.F.R. § 21.6(d)(1) (1988).



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